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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

14 DELLA ORTIZ,

Plaintiff,

v.

17 P.F. CHANG's CHINA BISTRO, INC., a
Delaware Corporation,

Defendant.

No. 1:24-CV-00079-KES-HBK

**ORDER DENYING MOTION TO FILE
AMENDED COMPLAINT AND TO
REMAND**

Doc. 7

Plaintiff Della Ortiz (“Ortiz”) moves for leave to file a first amended complaint and to remand this action to Fresno County Superior Court. Doc. 7-7 (“FAC”); Doc. 7-1 (“MTR”). Defendant P.F. Chang’s China Bistro, Inc. (“P.F. Chang’s”) filed an opposition, Doc. 9 (“Opp’n”). Ortiz did not file a reply. The Court took the motion under submission. Doc. 8. For the reasons set forth below, Ortiz’s motion is denied.

25 || I. Background

On November 15, 2023, Ortiz brought this case in Fresno County Superior Court alleging that defendant P.F. Chang's negligently failed to maintain a safe condition at its restaurant in Fresno, California, and that she was injured when she slipped and fell in the restaurant. Doc. 1-2

1 (“Compl.”). The complaint asserts causes of action under California law for negligence and
 2 premises liability against P.F. Chang’s and Doe defendants. *Id.* P.F. Chang’s removed the action
 3 to this Court on January 17, 2024, based on diversity jurisdiction. Doc. 1 (“Notice of Removal”).

4 In its notice of removal, P.F. Chang’s asserted that this Court has subject matter
 5 jurisdiction because the amount in controversy exceeds \$75,000 and the parties are completely
 6 diverse. *Id.* at 4–6. Ortiz is a resident of Fresno County, California, and P.F. Chang’s is a
 7 corporation registered in the state of Arizona with its principal place of business in Arizona. *Id.*
 8 ¶¶ 18, 20.

9 On February 14, 2024, Ortiz filed the pending motion for leave to file a first amended
 10 complaint to join Connor O’Neal (“O’Neal”), a resident of Fresno, California. *See* FAC ¶ 3. In
 11 her motion, Ortiz also moved to remand the case to state court. MTR. Ortiz argues that remand
 12 is required because P.F. Chang’s notice of removal was untimely and because complete diversity
 13 will not exist if Ortiz is given leave to file her FAC as O’Neal is a California resident, depriving
 14 this Court of jurisdiction.¹ *Id.*

15 **II. Timeliness of Removal**

16 The Court first turns to Ortiz’s argument that defendant’s removal was untimely and
 17 therefore defective.

18 **A. Legal Standard**

19 “The notice of removal of a civil action or proceeding shall be filed within 30 days after
 20 the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting
 21 forth the claim for relief.” 28 U.S.C. § 1446(b)(1). “[I]f the case stated by the initial pleading is
 22 not removable, a notice of removal may be filed within thirty days after receipt by the defendant,
 23 through service or otherwise, of a copy of an amended pleading, motion, order or other paper
 24 from which it may be first ascertained that the case is one which is or has become removable.”
 25 28 U.S.C. § 1446(b)(3).

26
 27 ¹ Due to the elevation of the prior district judge, no district judge was assigned to this matter
 28 from January 17, 2024, the date the action was filed, to March 13, 2024. *See* Doc. 10. The case
 was reassigned to the undersigned on March 14, 2024. *See id.*

1 “A removal notice filed after the 30-day time period constitutes a procedural defect. . . .
2 Thus, a case removed after this time period may be remanded on procedural grounds upon a
3 motion by plaintiff filed within 30 days of removal [pursuant to 28 U.S.C. § 1447(c)].” *Id.*
4 (citing *Kelton Arms Condo. Owners Ass’n v. Homestead Ins. Co.*, 346 F.3d 1190 (9th Cir. 2003)).

5 **B. Discussion**

6 Ortiz argues that the thirty-day removal period under section 1446(b) began on November
7 15, 2023, when P.F. Chang’s received the initial pleading, and that defendant’s notice of removal,
8 filed January 17, 2024, was therefore untimely. MTR at 8. Ortiz acknowledges that her
9 complaint did not allege the amount in controversy. However, Ortiz argues that pre-filing
10 correspondence between her and P.F. Chang’s constitutes “other paper[s],” contemplated by
11 1446(b)(3), that provide “context” regarding the amount in controversy to be considered with the
12 initial complaint filed on November 15, 2023. *Id.* Specifically, Ortiz asserts that she sent a pre-
13 filing demand letter to P.F. Chang’s insurer on October 11, 2023, demanding \$1 million to
14 resolve her claims. *Id.* at 4. She argues that a response letter from P.F. Chang’s counsel reflected
15 that P.F. Chang’s was aware of plaintiff’s demand, which was in excess of the \$75,000 amount in
16 controversy requirement for diversity jurisdiction. *Id.* at 9. Ortiz’s argument that such
17 correspondence provides sufficient context to trigger the thirty-day removal period fails.
18

19 “[R]emovability under § 1446(b)[1] is determined through examination of the four corners
20 of the applicable pleadings, not through subjective knowledge or duty to make further inquiry.”
21 *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005); *see also Carvalho v.*
22 *Equifax Information Services, LLC*, 629 F.3d 876, 886 (9th Cir. 2010) (confirming holding in
23 *Harris*, 425 F.3d 689). Moreover, the Ninth Circuit has held that “any document received prior to
24 receipt of the initial pleading cannot trigger the second thirty-day removal period” given that the
25 thirty-day period cannot begin before the filing of the initial pleading. *Carvalho*, 629 F.3d at 886.
26 Nor can a “pre-complaint document containing a jurisdictional clue . . . operate in tandem with an
27 indeterminate initial pleading to trigger some kind of hybrid of the first and second removal
28 periods” in which the removal period would begin on the date the initial pleading was filed based

1 on the receipt of a pre-complaint document. *Id.*

2 Therefore, Ortiz cannot rely on any correspondence preceding her initial pleading to
 3 trigger the thirty-day removal period under section 1446(b)(3). Rather, Ortiz's statement of
 4 damages, alleging damages exceeding the \$75,000 amount-in-controversy requirement, filed on
 5 January 3, 2024 (Notice of Removal, Ex. C), triggered the thirty-day removal period.
 6 P.F. Chang's filed its notice on January 17, 2024, within the thirty-day removal period under
 7 section 1446(b)(3). Notice of Removal. Accordingly, P.F. Chang's timely filed its notice of
 8 removal pursuant to 28 U.S.C. § 1446(b).

9 **III. Joinder of O'Neal as Defendant**

10 The Court next turns to Ortiz's motion for post-removal joinder of O'Neal, and to
 11 defendant's fraudulent joinder argument.

12 **A. Legal Standard**

13 “If after removal the plaintiff seeks to join additional defendants whose joinder would
 14 destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the
 15 action to the State court.” 28 U.S.C. § 1447(e). “The language of § 1447(e) is couched in
 16 permissive terms,” and “the decision regarding joinder of a diversity destroying-defendant is left
 17 to the discretion of the district court.” *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir.
 18 1998). District courts generally consider the following factors when exercising their discretion to
 19 permit or deny joinder of non-diverse defendants:

20 (1) whether the new defendants should be joined under Fed. R.
 21 Civ. P. 19(a) (“Rule 19”) as “needed for just adjudication”;
 22 (2) whether the statute of limitations would preclude an original
 23 action against the new defendant[] in state court; (3) whether there
 24 has been unexplained delay in requesting joinder; (4) whether
 25 joinder is intended solely to defeat federal jurisdiction; (5) whether
 26 the claims against the new defendant appear valid; and (6) whether
 27 denial of joinder will prejudice the plaintiff.

28 *IBC Aviation Serv., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V.*, 125 F. Supp. 2d 1008,
 1011 (N.D. Cal. 2000) (citing, *inter alia*, *Palestini v. Gen. Dynamics Corp.*, 193 F.R.D. 654, 658
 (S.D. Cal. 2000)).

29 “Any of these factors might prove decisive, and none is an absolutely necessary condition

1 of joinder.” *Sabag v. FCA US, LLC*, No. 2:16-CV-06639-CAS(RAOX), 2016 WL 6581154, at
 2 *4 (C.D. Cal. Nov. 7, 2016) (quoting *Cruz v. Bank of N.Y. Mellon*, No. 12-CV-00846-LHK, 2012
 3 WL 2838957, at *4 (N.D. Cal. July 10, 2012)). “Considerations of judicial economy are
 4 especially relevant and often animate courts’ assessment of these factors.” *Serna v. Costco*
 5 *Wholesale Corp.*, No. 1:23-cv-01225-KES-CDB, 2024 WL 4554866, at *2 (E.D. Cal. Oct. 23,
 6 2024) (citing *Palestini*, 193 F.R.D. at 658). A defendant “bears the burden of establishing that
 7 removal is proper,” and any doubt as to removability is resolved in favor of remand. *Provincial*
 8 *Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009). However,
 9 “once a case has been removed to federal court, the court must scrutinize a diversity-destroying
 10 amendment to ensure it is proper under [§ 1447(e)]” irrespective of plaintiff’s right to amend
 11 under Federal Rules of Civil Procedure 15(a).” *Namvar v. Select Portfolio Servicing*, No. 3:14-
 12 cv-0600-GPC-BGS, 2014 WL 4955707 at *4 (S.D. Cal. Oct. 1, 2014) (citing *McGrath v. Home*
 13 *Depot USA, Inc.*, 298 F.R.D. 601, 606 (2014)).

14 B. Discussion

15 The Court considers each of the six factors set out above in turn. First, the Court
 16 considers whether a new defendant should be joined under Rule 19 as needed for just
 17 adjudication. “Rule 19 requires joinder of persons whose absence would preclude the grant of
 18 complete relief, or whose absence would impede their ability to protect their interests or would
 19 subject any of the parties to the danger of inconsistent obligations.” *Dunning v. Hallmark*
 20 *Specialty Ins. Co.*, No. 2:20-cv-02455-ODW, 2020 WL 6123133, at *2 (C.D. Cal. Aug. 11, 2020)
 21 (citation omitted). Notably, “[a]lthough courts consider whether a party would meet [Rule 19’s]
 22 standard for a necessary party, amendment under § 1447(e) is a less restrictive standard than for
 23 joinder under” Rule 19. *IBC Aviation Serv.*, 125 F. Supp. 2d at 1011–12. Therefore, this factor
 24 supports joinder when “failure to join would lead to separate and redundant actions” and
 25 discourages joinder when the party sought to be joined is only “tangentially related to the cause of
 26 action or would not prevent complete relief.” *Id.*

27 Ortiz argues that O’Neal’s joinder in the action is required to afford her complete relief
 28 because denying joinder would result in a separate action in state court and would limit

1 defendant's own liability in the instant action. MTR at 13. However, the proposed FAC fails to
 2 allege any basis for liability against O'Neal. In fact, the FAC does not assert anything concerning
 3 O'Neal's relationship to P.F. Chang's or any duty he may have owed to Ortiz. The only specific
 4 allegation as to O'Neal is that he is a resident of Fresno County. FAC ¶ 3. Moreover, the first
 5 cause of action, for negligence, is alleged solely against P.F. Chang's and DOES 1–50, not
 6 O'Neal. FAC ¶¶ 12–17.

7 While the second cause of action, premises liability, is alleged against all defendants,
 8 including O'Neal, *id.* ¶¶ 18–22, the FAC fails to allege that O'Neal had any role or responsibility
 9 with respect to P.F. Chang's that would provide a basis for premises liability. *See Gray v.*
 10 *America West Airlines, Inc.*, 209 Cal.App.3d 76, 81 (Cal. 1989) (“In premises liability cases...the
 11 duty to take affirmative action for the protection of individuals coming onto one's property ‘is
 12 grounded in the possession of the premises and the attendant right to control and manage the
 13 premises.’”) (internal citations omitted). The Court cannot determine that O'Neal's joinder is
 14 required to afford complete relief, as the FAC fails to state any viable claim against O'Neal. *See*
 15 *Namvar*, 2014 WL 4955707, at *4 (denying plaintiff's motion to remand where first amended
 16 complaint states no claim against new defendant to be joined). Accordingly, this factor weighs
 17 against joinder.²

18 Second, the Court considers the effect of the statute of limitations on Ortiz's ability to sue
 19 O'Neal separately. “If the statute of limitations would preclude the filing of an action against the
 20 new defendants in state court, this factor would weigh in favor of granting leave to amend to add
 21 the new defendants.” *Forster*, 2024 WL 3913461, at *3; *see also Carnegie-Mellon Univ. v.*
 22 *Cohill*, 484 U.S. 343, 352 (1988) (explaining that courts prefer to remand “when the statute of
 23 limitations on the plaintiff's state-law claim[] has expired before the federal court has determined

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 25 ² While counsel's declaration in support of Ortiz's motion to remand states, on information and
 26 belief, that O'Neal “was a franchisee and employee” of P.F. Chang's (Doc. 7-1 at ¶ 18), Ortiz
 27 does not include any such allegation in her proposed FAC, nor does the FAC reference the
 28 declaration. The FAC's only specific allegation as to O'Neal is that he is a resident of Fresno
 County. FAC ¶ 3. Moreover, even if the bare allegation that O'Neal was a franchisee or
 employee were in the FAC, the FAC would not, without more, sufficiently state a claim against
 O'Neal.

1 that it should relinquish jurisdiction over the case”). Ortiz does not argue that the statute of
 2 limitations would bar a separate action against O’Neal in state court. Thus, this factor weighs
 3 against joinder.

4 Third, the Court considers whether there was an unexplained delay in seeking joinder.
 5 Ortiz filed her initial complaint on November 15, 2023, P.F. Chang’s removed the case on
 6 January 17, 2024, and on February 14, 2024, Ortiz filed her motion to join O’Neal and to remand
 7 the case. MTR. On its face, this timeline does not raise any suspicion of unexplained delays or
 8 delays made in bad faith. *See, e.g., IBC Aviation Serv.*, 125 F. Supp. 2d at 1012 (finding that
 9 motion for post-removal joinder filed over two months after initial complaint was timely). In
 10 fact, in its opposition, P.F. Chang’s concedes there is “no clear evidence Plaintiff engaged in
 11 unexplained delay in seeking the joinder.” Opp’n at 15. As there is no facial indication nor
 12 allegation of unjust delay, Ortiz did not unreasonably delay in seeking to amend her complaint.
 13 Accordingly, this factor weighs in favor of joinder.

14 Fourth, the Court considers whether joinder is intended solely to defeat federal
 15 jurisdiction. “The question of whether joinder is solely intended to defeat jurisdiction is
 16 ‘intertwined’ with the question of whether the claims against the new defendant appear valid.”
 17 *Sabag*, 2016 WL 6581154, at *5–6 (finding that plaintiff’s motive in joining dealership defendant
 18 was “not solely to destroy diversity” because plaintiff’s claim against dealership was “facially
 19 legitimate”). “Courts have permitted joinder even where the plaintiff appears to be primarily
 20 motivated by a desire to defeat diversity jurisdiction, as long as the plaintiff has alleged a valid
 21 claim against the non-diverse defendant.” *Forster*, 2024 WL 3913461, at *4 (quotations omitted).

22 Ortiz has failed to demonstrate a colorable claim against O’Neal. While a restaurant
 23 proprietor owes a common law duty of care to invitees and can be held liable for breach of that
 24 duty, *see Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 241 (Cal. 2005) (“[a] restaurant or bar
 25 proprietor also has a duty to warn patrons of known dangers. . . .”), the burden to allege such a
 26 theory of liability lies with the plaintiff in her complaint. Fed. R. Civ. P. 8(a)(2) (“A pleading that
 27 states a claim for relief must contain: [] a short and plain statement of the claim showing that the
 28 pleader is entitled to relief.”). Ortiz’s proposed FAC fails to assert any basis for liability against

1 O’Neal. Accordingly, this factor weighs against joinder.

2 Fifth, the Court considers whether the claims against O’Neal appear valid. “This factor
3 requires only that the claim be facially valid, which is a lower standard than on a motion to
4 dismiss or a motion for summary judgment.” *Forster*, 2024 WL 3913461, at *4. As set forth
5 above, this factor is not satisfied. Ortiz makes no facially valid claim of negligence and premises
6 liability against O’Neal. Thus, this factor weighs against joinder.

7 The above analysis of the fourth and fifth factors also informs the consideration of
8 defendant’s fraudulent joinder argument. A defendant claiming “fraudulent joinder bears a
9 ‘heavy burden’ given the ‘general presumption against finding fraudulent joinder.’” *Grancare,*
10 *LLC v. Thrower*, 889 F.3d 543, 548 (9th Cir. 2018) (quoting *Hunter v. Philip Morris USA*, 582
11 F.3d 1039, 1046 (9th Cir. 2009)). To meet this “heavy burden,” P.F. Chang’s must show either
12 “(1) actual fraud in the pleading of jurisdictional facts, or (2) [an] inability of the plaintiff to
13 establish a cause of action against the non-diverse party in state court.” *Id.* P.F. Chang’s does not
14 allege any actual fraud in Ortiz’s pleading of the jurisdictional facts. Fraudulent joinder can be
15 “established the second way if a defendant shows that an ‘individual joined in the action cannot
16 be liable on any theory.’” *Id.* (quoting *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th
17 Cir. 1998)).

18 As addressed above, the FAC fails to state a claim against O’Neal on any theory.
19 Accordingly, Ortiz fails to show a “possibility that a state court would find that the complaint
20 states a cause of action” against the restaurant owner. *Hunter v. Philip Morris USA*, 582 F.3d
21 1039, 1046 (9th Cir. 2009) (quoting *Tillman v. R.J. Reynolds Tobacco*, 340 F.3d 1277, 1279 (11th
22 Cir. 2003) (per curiam) (emphasis added)).

23 Sixth, the Court considers whether denial of joinder will prejudice Ortiz. “Prejudice exists
24 if the proposed defendant is ‘crucial’ to the case. Prejudice does not exist if complete relief can
25 be afforded without that defendant.” *Forster*, 2024 WL 3913461, at *4 (citing *Sabag*, 2016 WL
26 6581154, at *6). Given that the Court is not presented with claims against O’Neal that would
27 provide Ortiz relief, it cannot conclude that complete relief would be denied without the joinder
28 of O’Neal. Accordingly, this factor weighs against joinder.

1 On balance, the *Palestini* factors weigh against the joinder of O'Neal. While Ortiz did not
2 unreasonably delay in seeking to amend her complaint, her proposed FAC fails to allege any
3 viable claim against O'Neal. Accordingly, Ortiz fails to establish a basis to file her FAC, and the
4 Court retains diversity jurisdiction over this action.

5 **IV. Conclusion and Order**

6 Accordingly, the Court ORDERS:

7 1. Ortiz's motion for leave to file first amended complaint and to remand action to
8 state court, Doc. 7, is DENIED.

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11 IT IS SO ORDERED.

12 Dated: January 16, 2025



UNITED STATES DISTRICT JUDGE

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